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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 854

LUCKENBACH STEAMSHIP COMPANY, a corporation,

Petitioner,

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,

and

HERMAN TELFAIR,

Respondents.

PETITION, OR IN THE ALTERNATIVE, CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION, OR IN THE ALTERNATIVE, CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A

OPINIONS BELOW

The petitioner, or in the alternative, cross petitioner, Luckenbach Steamship Company, prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered June 19, 1970, in the case of HERMAN TELFAIR, Plaintiff-Appellant, vs. ZIM ISRAEL NAVIGATION COMPANY, LIMITED, a foreign corporation, Defendant-Third Party Plaintiff-Appellee, vs. LUCKENBACH STEAMSHIP COMPANY, a corpora-

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NOTE: All Emphasis Supplied
R: References to Record on Appeal before Fifth Circuit on appeal of Telfair
T: Transcript of trial proceedings in record below.

tion, Third Party Defendant-Appellant, Case No. 27,418, which, among other things, affirmed a final judgment in favor of Zim Israel Navigation Company, Limited, Third Party Plaintiff, against Luckenbach Steamship Company, Third Party Defendant.

Luckenbach Steamship Company, the petitioner here, was seeking reversal of the judgment which was entered by the trial court on indemnity over by Zim Israel Navigation Company, Limited, Third Party Plaintiff, against Luckenbach Steamship Company, Third Party Defendant.

Copies of the following decisions, opinions and proceedings are appended hereto:

Appendix A - Order of the United States Court of Appeals for the Fifth Circuit, dated July 22, 1970, denying Luckenbach's petition for rehearing.

Appendix B - Opinion and judgment of the Fifth Circuit, affirming the judgment, dated June 19, 1970.

Appendix C - Final Judgment of the United States District Court in and for the Middle District of Florida, dated February 26, 1969.

Appendix D - Order of the United States District Court in and for the Middle District of Florida, denying third party defendant Luckback's motion for new trial, dated April 9, 1969.

Appendix E - Findings of fact and conclusions of law and final judgment of United States District Court in and for the Middle District of Florida dated February 26, 1969.

B

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgment of the United States Court of Appeals, Fifth Circuit, was dated June 19, 1970 and is reported at 428 F. 2d 127 (1970). (Appendix B.) The petition for rehearing was denied, July 22, 1970. (Appendix A.) Jurisdiction is invoked pursuant to 28 U.S.C., §1254(1); and 28 U.S.C. 2101(c); and Supreme Court of the United States, Revised Rules, effective July 1, 1970, Rule 19(1) (a) and (b); Rule 21; Rule 22(3).

C

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT AND APPELLATE COURT ERRED:

1. IN APPLYING TO THE FACTS OF THIS CASE, INVOLVING USE BY STEVEDORE OF A FIXED ACCESS SHIP'S LADDER TO A CARGO HOLD, RULES ESTABLISHED FOR DETERMINING A STEVEDORE'S LIABILITY FOR DEFECTS IN SHIP'S EQUIPMENT BROUGHT INTO PLAY WITH RESULTANT INJURY BY THE STEVEDORE'S ACTIVE CONDUCT OR NEGLIGENCE WHILE USING SUCH EQUIPMENT UNDER HIS SUPERVISION AND CONTROL FOR PERFORMING STEVEDORING FUNCTIONS.

2. IN HOLDING THAT A STEVEDORE HAS THE DUTY TO INSPECT A FIXED SHIP'S LADDER TO A HOLD FOR DEFECTS NOT VIS-

IBLE BY A CURSORY INSPECTION FROM THE TWEEN DECK BEFORE PERMITTING USE OF SUCH A LADDER BY LONGSHOREMEN TO REACH CARGO FOR DISCHARGE WHEN THERE IS NO PRACTICABLE MEANS OF INSPECTION SHORT OF DESCENDING SUCH LADDER.

2. IN HOLDING THAT A GLOB OF GREASE ON A LOWER RUNG OF SUCH A FIXED LADDER IS A VISIBLE DEFECT, EVEN THOUGH IT CANNOT BE SEEN BY A CURSORY INSPECTION FROM THE TOP OF THE LADDER, ON THE BASIS OF ISOLATED AND INCREDULOUS EVIDENCE BY ONE WITNESS WHICH CONFLICTS WITH THE TESTIMONY OF AT LEAST FOUR OTHER WITNESS AS TO THE GREASE BEING WELL DOWN THE LADDER AND THE UNDISPUTED PHYSICAL LOCATION ON THE LADDER WHERE THE LONGSHOREMAN, TELFAIR, SLIPPED ON GREASE AND SUFFERED INJURY.

4. IN SELECTING AS A PRIME BASIS FOR FIXING LIABILITY ON THE STEVEDORE ISOLATED AND DIAMETRICALLY CONFLICTING EVIDENCE BY THE SAME WITNESS, BEAM, AS TO THE TIME HE OBSERVED THE GREASE ON THE LADDER (BEFORE OR AFTER TELFAIR'S INURY) IN RELATION TO THE DESCENT OF SUCH LADDER BY TELFAIR WHO SLIPPED ON SUCH GREASE AND SUFFERED INJURY.

5. IN HOLDING THAT THE STEVEDORE OR HIS HEADER WAS NEGLIGENT OR BREACHED THE IMPLIED WARRANTY OF WORKMANLIKE PERFORMANCE IN ANY PARTICULAR SO FAR AS A DETERMINATION OF LIABILITY IS CONCERNED AS BETWEEN THE SHIPOWNER AND THE STEVEDORE.

D

STATUTES AND CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES, AND REGULATIONS INVOLVED

None Involved

E

STATEMENT

On December 1, 1966, Herman Telfair, a Florida citizen, filed an action at law in the Circuit Court for Hillsborough County, Florida, against Zim Israel Navigation Company Limited, an Israeli Corporation. Telfair, a longshoreman, alleged that he slipped on grease on an access ladder to the hold while working aboard the defendant's ship, The Mazal, in May, 1966, at the Luckenbach Terminal in the Port of Tampa, and sustained severe and permanent personal injuries. The complaint was framed in two counts: (1) negligence, and (2) unseaworthiness. A trial by jury was demanded.

On December 22, 1966, the defendant, Zim Israel, removed the case to the United States District Court, Middle District of Florida, on diversity grounds. Zim Israel answered and interposed, inter-alia, general denials and an affirmative defense of contributory (or comparative) negligence.

In May, 1967, Zim Israel brought a third party complaint against the stevedore company, Luckenbach Steamship Company, a non-Florida corporation, contending that if the plaintiff was injured as alleged, the stevedore was at fault and would be ultimately responsible and would be obliged to indemnify Zim Israel for any recovery against plaintiff. Lukenbach answered denying responsibility.

After extensive discovery, the case between Telfair and Zim Israel proceeded to trial before the Honorable Joseph P. Lieb and a jury on March 25, 1968. The third party action between Zim Israel and Luckenbach as to indemnity was reserved by the court for its determination without a jury. In this trial the jury returned a verdict for the plaintiff on the unseaworthiness count and in favor of Zim Israel on the negligence count, and judgment was entered accordingly in favor of the plaintiff for $133,385, plus costs.

Subsequent to this first trial, Zim Israel filed post-trial motions and under date of May 27, 1968, the court granted Zim Israel's motion for new trial on the ground that there was sufficient evidence to have permitted the jury to consider the issue of contributory negligence of the plaintiff which the judge had removed from the jury's consideration by direction at the close of all of the evidence.

A second trial was had and a jury verdict was rendered in favor of the plaintiff and judgment was entered accordingly for $50,000, plus costs. Motion for new trial was denied and the plaintiff filed an appeal on December 20, 1968, from the judgment of March 27, 1968, which was entered in the first trial.

The trial proceedings in the third party action between Zim Israel and Luckenbach were heard without a jury before the court (which also considered the evidence before the jury). On February 26, 1969, the trial court entered its findings of fact and conclusions of law and judgment thereon in favor of Zim Israel and against Luckenbach on the third party claim (A 10). Upon denial of its motion for new trial Luckenbach filed its appeal on April 30, 1969.

Zim Israel, an Israeli corporation, was owner of the vessel Mazal in May, 1966. The ship completed a cargo discharge at Miami, Florida at 2 A.M. on May 3, 1966 (T 194-196). The ship arrived at the Tampa dock approximately 10:10 A.M. May 4, 1966 (T 201). The hatches had been closed in Miami and were opened in Tampa at approximately 12:45 A.M. (T 201). Telfair was a longshoreman for Luckenbach, and "header" (foreman) of a 14 man crew of longshoremen (T 36-37).

Around 1:00 P.M., May 4, Telfair's crew was directed to the Mazal to unload cargo (wine and cherries) from No. 4 hatch. This crew "rigged" the booms and prepared to enter the hold to unload the cargo (T 47-49). They went down a ladder to the upper "tween deck," where they had to move two beams over the hatch so that the cargo could be brought out (T 53-54).

A member of the ship's crew, who was on watch particularly to guard the cargo, preceded the longshoremen and was in the hold when the first longshoreman, Beam, descended the ladder into the hold (329-334, 748-751). Thus, such sailor, whose name Chief Mate Hami could not recall (748-749), was the first man to go down the ladder on which Telfair suffered his knee injury.

It was customary to put a member of the ship's crew in the hold when wine or whiskey, or perhaps other cargo, is being unloaded. See Beam's testimony (T 329-334) and Chief Mate Hami's testimony (749-751).

Apparently, this sailor on watch descended the ladder in question without mishap and was sitting on a box when Beam went down.

Longshoreman Beam was the first to descend the ladder into the hold where the cargo was stored (T 56, 101-103). Telfair was next and got on the ladder before Beam reached the bottom (T 59-60). On his way down toward the bottom, Telfair slipped, struck his right knee and shouted for the others at hatch opening to be careful, something was wrong with the ladder and that he had hurt himself (T 56, 61). The testimony of Beam, the first longshoreman to go down the ladder gave conflicting versions as to when he first saw the grease on a lower rung and whether he had any difficulty descending the ladder. His amazing testimony on which the district court heavily relied will be examined in detail hereinafter.

TESTIMONY OF HERMAN TELFAIR

Telfair testified that longshoreman Beam, who was standing nearest the ladder by the tween deck, was first down the ladder (T 56) and that he, Telfair, got on the ladder just after Beam went down, not too close so that he would not step on Beam's hands (T 59-60). He said that longshoremen White, Hawkins and Favors, and three other longshoremen were standing at the hatch

opening ready to go down the ladder (T 101-103). Telfair said he watched Beam clear so that Telfair could get on the ladder, and that he did not see Beam slip or make a misstep (T 103). He said that when he first got on the ladder he looked down to be sure that he would not step on the hands or head of Beam, but during the rest of the descent mostly looked up (T 59-60). He also said that Beam never said anything to him or the others as Telfair was going down the ladder (T 111). He said that he slipped and struck his right knee on the side of the ladder near its bottom and yelled to the longshoreman above him that he had hurt himself, that there was grease on the ladder and for them to watch out in descending it (T 56, 61). The other longshoremen came down and none slipped or was injured (T 62). He said that he began work around 1:00 P.M. and was hurt shortly after that (T 64). He testified that there were artificial lights around the ladder up underneath it, and while they were a bit dim at the ladder, the light was adequate and that he did not ask for lights as it was daytime with some artifical light, and no lights were needed where they were going to work (T 85, 121, 149). He said that he never had lights put on in the daytime just to go down a ladder (T162-163).

There was no testimony that the area around the ladder was dark (T 658-659). Favors said the sun was shining and that he could see clearly (T 46).

TESTIMONY OF ROBERT EARL BEAM

It is obvious from the trial court's Findings Nos. 5 and 6, and Conclusion of Law No. 2 (A 12, 15) that in imposing liability on Uuckenbach, as Stevedore, great weight was placed on Beam's testimony as to what happened when he went down the ladder, as to when he first saw the grease and on the fact that Beam did not shout a warning to Telfair and the others above him.

The evidence shows that Telfair got on the ladder immediately after Beam began his descent of the ladder. (T 105, 249-250). There could be only a few seconds between their progress down the ladder. Beam's testimony re his descent is most important and should be examined closely.

The record shows that Beam changed his sworn testimony at least twice at the trial on October 16-18, 1968, from that given in his deposition on March 31, 1967. His testimony on deposition was about 10 months after the accident, whereas this trial testimony was 29 months after the accident.

On deposition Beam testified:

Q And you were the first man down?

A Down there. That's right.

Q Okay. How did you get down to where you were?

A I went down the ladder, same ladder he went down. I didn't fall, though. He slipped on the ladder.

Q Okay. *Did you have any trouble going down the ladder?*

A *No, didn't,* because I was always a little nervous on them ladders. I always watch, take my time going down.

Q Okay. What time of day was it?

A It was, I would say, around twenty after one, because I went to work at one o'clock; had done rigged up on deck, and by that time we was down in the hold.

Q All right. Now, you were in the lower hold. How far were you from him at the time?

A Well, I was just — let me see. I'll say around five or six feet, something like that, because when I got off the ladder I just walked out from under it, see.

Q And you —

A He came down next.

Q Which way were you facing?

A Well, I was facing the ladder.

Q Okay. Was there anything between you and him?

A No, nothing (Beam, deposition, 3/31/67, P. 5-6).

. . . .

Q And did Telfair say anything right at that time?

A No. He said some kind of little cuss word when he hit whatever he hit, you know.

Q Tell me how he slipped there; what you saw happen.

A Well, see, just before you get to the bottom of the ladder — I don't know how high it may be, but the crew had been working down there, or

something — but there was grease on the ladder, *and his foot slipped, and he hit his knee*, on the — you know what I mean — on the ladder *just before he got to the bottom rung*. He bumped his leg, said some kind of little cuss word, but, actually, I didn't think he was hurt, you know.

Q *How did you know there was grease on the ladder?*

A *Because you could see it.* It was some of that cable grease. I don't know how they managed it, whether they had been working on the ladder, or what the ship had been doing, but, you know, it was thick grease like they oil them cables with.

Q *When did you see the grease?*

A *After he slipped, because when I went down I didn't even pay it any attention. I didn't slip.*

Q *You didn't slip?*

A *No.* But after he slipped, then he hollered back up and told the rest of the guys to be careful coming down, see.

Q *Have you ever told him that you did slip?*

A *No. I didn't.*

Q Yes.

A *See, I didn't slip.*

Q And you didn't tell him that you slipped?

A *No. No, I didn't, because I really wasn't expecting him to slip* (Beam, Deposition, 3/31/67, Pg. 6-8).

. . . .

Q *Did you [illegible] the grease on the ladder right after Telfair fell?*

A *That's right, because I went over there and looked at the ladder after he slipped.*

Q Did you actually feel the grease?

A Yes. It was thick (Beam, Deposition, 3/31/67, P. 17).

Q Tell me about that grease a little more, if you will. What color was it?

A Well, *it was brown looking grease.* I figured it was something off a cable. It was thick; thick grease on one of the rungs of the lader.

Q And, by "cable" that would be like the runner?

A That's right.

Q *How much of it was there?*

A *Well, it wasn't but just only about one or two of the rungs. I mean it wasn't piled. It wasn't thick, you know, but it was grease on there;* could have got on there from maybe somebody—a sailor—climbed up and down the ladder and been walking on deck. I don't know how it got on the ladder, but it was on the ladder.

Q One or two rungs?

A That's right (Beam, Deposition 3/31/67, P. 19-20).

From this testimony it is obvious that Beam had no cause to warn Telfair who was well on the way down the ladder when Beam reached the cargo floor.

At trial before the jury, however, Beam changed his testimony by testifying as follows:

Q After you got on the ladder and started down, tell us what happened?

A I started down, and just before I got down to the level *I slipped a little bit.*

Q Just before you got to the level you slipped a little bit?

A Yes sir.

Q Did you see what it was you slipped on?

A Yes, I saw what it was.

Q What was it?

A It was grease.

Q What kind of grease was it? Can you describe it?

A It was a thick dark brown grease (T 312).

. . . .

Q And did you see Herman slip?

A Yes, sir.

A After he slipped, did he fall or stay on the ladder?

A He slipped and fell.

Q Did you see any grease on Herman after the accident?

A No more than on the leg of his pants knee.

Q On his pants knee?

A Yes, sir.

Q Now, after Herman slipped, *did you say anything to anybody else about the grease on the ladder,* to watch out or anything like that?

A *Yes, I hollered back up, but I don't know who was next on the ladder. I hollered back "for you all to be careful on the ladder, because there was grease on the ladder."* (T 313).

Q Now, did you look at this grease on the ladder before —

A No, sir. You say did I look at it before?

Q Wait for my question, please. *Did you look at the grease on the ladder before Telfair fell?*

A *No sir, I didn't pay any attention to it.*

Q Did you see grease on the ladder before Telfair fell?

A I saw it on my feet, yes, sir.

Q *Did you see grease on the ladder before Telfair fell?*

A *Yes, I did. I saw the grease on the ladder.*

Q *Before he fell you saw grease on the ladder?*

A *Yes, sir.*

Q Did you holler up to him, "to watch out, there is grease on the ladder"?

A No, sir, I didn't (T 319n).

. . . .

A *I didn't have any trouble. I went down the ladder, as I just said. I didn't have any trouble about going down the ladder.*

Q You mean that slipping that you did —

A That is the only thing. *It wasn't no trouble to me. I mean that happens to me a lot of times working, yes sir. That wasn't no trouble* (T 323).

He again reversed his field when questioned on behalf of Luckenbach before the Court (with the jury excluded), and returned to the testimony he gave on deposition. He testified:

Q Has your testimony changed any in this trial?

A Has it changed?

Q What?

A No, sir. The only thing, I just probably misunderstood the question.

Q When did you see that grease? Didn't you swear here that you saw it after he slipped?

A I saw the grease — I didn't fall, I slipped. What I mean is I didn't fall off the ladder. I thought when he said "slip", I was under the impression he mean did I fall off the ladder?

Q *When did you see the grease?*

A *Oh, I saw the grease after he slipped down.*

Q *After what?*
A *After Monkey slipped.*

Q *After who slipped?*

A *Telfair slipped.*

Q You didn't see the grease before Telfair slipped; is that it?

A I saw it when my foot slipped on the rung of the ladder, and some grease was on my shoe, the bottom of my shoe, *And then I paid particular attention after Telfair slipped.*

Q Now, you didn't know there was any grease on your shoe until after you say Telfair slipped; is that your testimony?

A He slipped, yes.

Q What?

A *Yes, sir, After Telfair slipped, then I paid attention.*

Q So you had no call to holler up and warn them; is that right?

A Well, I slipped a little bit on the ladder, myself. I didn't fall off the ladder, my foot slipped. One of my feet slippedb on the rung of the ladder. One of my feet, just one of them.

Q *But the first time you saw the grease was after Telfair slipped; is that it?*

A *Yes, sir. Right then I specially paid strict attention to the ladder, after he slipped.*

Q So you didn't know what made you slip; is that right?

A Well, after I saw it on my shoe, on the bottom of my shoe, the grease was. (T 335, 337)

In view of the ease with which Beam changed his sworn testimony at least twice, the simple question arises as to what credibility can be given his supposed discovery of grease before Telfair slipped and injured his knee. Obviously it forms the keystone of liability against Luckenbach as found by the trial court. His desposition testimony in March 31, 1967, was much nearer in time to the accident of May 4, 1966, and more apt to be true than his trial testimony 29 months after the accident. He also testified at trial that he shouted a warning and shortly thereafter said he did not do so (See above testimony).

Furthermore, as has been pointed out above, in descending this vertical ladder it would be virtually impossible for Beam to see this grease until he reached the floor and looked up at the ladder. By this time Telfair was well down the ladder to the point of injury.

DUTY TO INSPECT LADDER

The district court Finding No. 7 (A 13) says that Telfair should have inspected the ladder before permitting anyone or himself to use it.

The applicable law is contrary to this Finding as will be shown hereinafter by case law. However, we are concerned here with the facts and practicalities of the situation.

For Telfair to have inspected the fixed ladder would have required, for all practical purposes, that he do just what he did when he was injured, namely, go down the ladder. There was no custom nor practice for this to be done at Tampa, nor any rule or regulation requiring this (T3 29). Lucas, Dock Foreman, and Cowles, Luckenbach Superintendent, said Telfair should not have gone down the ladder ahead of time to inspect it (T3 23).

Unless the ladder was visibly and patently defective from looking at it from the tween deck, it would be reasonable and logical to assume it was not defective because of grease on the left side of one lower rung or for other causes. Telfair said he was not supposed to go first down a ladder or to go down and inspect it (T 155-156). Three witnesses said they looked down and could see no grease and that Telfair slipped near the bottom of the ladder (White T 229, 237, 265; Hawkins T. 620; Beam T 314, 318-319; Telfair T 61). Moreover, the assumption

that the ladder was safe and not defective would appear to be most reasonable, since one of the ship's crew, assigned to guard the cargo, had preceded Beam down the ladder into the No. 4 hold and was sitting on a box (A 329-334). xcept by use of this ladder, there was no other apparent way for him to have assumed this position in the hold (A 329-334).

In Conclusion of Law No. 5 (A 16) the district court found that Luckenbach breached Sec. 9.25 of the Safety and Health Regulations for Longshoremen by not prohibiting use of the ladder when it was visibly unsafe. This regulation, now Sec. 1504.25(b) of such regulations as published by U.S. Department of Labor, merely provides:

> "When any fixed ladder is *visibly unsafe* the employer shall prohibit its use by employees."

Of course, the key words here are "visibly unsafe." As has been shown, the ladder used by Telfair was not "visibly unsafe," the overwhelming testimony being that one could not see the grease on the rung from the tween deck where the longshoremen were watching Telfair descend the ladder. The grease was visible only after one descended the ladder and examined the rung near the bottom of the ladder to which the grease adhered. Only one witness, Favors, whose evidence will be closely examined, said that grease was on the very top rung and visible. This was contrary to the testimony of Beam, Telfair, White, Hawkins and to their testimony as to where Telfair slipped well down the ladder.

Favors' testimony is incredible and indicates that Beam, Telfair and the others would deliberately grab the greased top rungs of a ladder to descend it. This strains

all credulity but was the only evidence as to visibility referred to by the court in Finding No. 11 (A 14).

F

REASONS FOR ALLOWING THE WRIT

Luckenbach contends that the district court and the appellate court committed basic legal error in selecing rules and principles of the law which have no proper application to this case. The cases and authorities cited by the district court in its conclusions of law, clearly show that it was selecting cases and rules which apply when the stevedore takes over the supervision and control of equipment of the ship, or when the stevedore by active and negligent conduct brings into play a defect constituting unseaworthiness of a ship or its equipment. The rules applying to these cases as to the stevedore's liability, are bottomed on the fact that acual functional use is being made of part of the ship's equipment or the stevedore by active and negligent conduct brings into play a defect amounting to unseaworthiness.

The very cases cited by the district court in support of these conclusions of law, if closely examined, reveal that they are not applicable to the instant case. The court in its support, cites *Southern Stevedoring and Contracting Company vs. Hellenic Lines, Ltd.*, 388 Fed. 2d 267, 270-271 (5th Cir. 1968); *United States Lines Co., v. Williams*, 365 F.2d 332 (5th Cir. 1966); *Italia Societa vs. Oregon Stevedoring Company*, 376 U.S. 315 (1964); *Crumady v. Joachim Hendrik Fisser*, 350 U.S. 423, 428-429 (1959) (A). The rules of these cases are not ap-

plicable to the instant case. The district court entertained a fundamental misconception of law in attempting to apply such rules to the facts in the case at hand.

The Petitioner believes that the decision and judgment here are in conflict in the line of cases that should control the instant case. These cases are *Cia Maritma Del Nervion v. James J. Flanagan Shipping Corporation, Stevedore Division* 308 F. 2d 120 5 Cir. (1962) (perhaps the leading case of that Court dealing with a fixed ladder going into the hold of a ship); *Ignastyuk v. Tramp Chartering Corp.*, 250 F. 2d 198, 201 (2 Cir. 1957); *Calderola v. Cunard Steamship Company*, 270 F. 2d 475 (2nd Cir. 1960), cert. den. 364 U.S. 884, 81 S. Ct. 172; involving grease on a ship's ladder, and *Smith v. Jugoslvenska Linisjska Plovidba*, 278 F. 2d 176 (4 Cir. 1960), where stevedore's liability was predicated on actual knowledge by its safety man that the ladder causing the injury was not secured by bolts, thus having actual notice of the defect; *Santomarco v. United States*, 277 F. 2d 255 (2 Cir. 1960), involving a longshoreman slipping on oil which was clearly obvious on the dock and ignored by the longshoreman and stevedore; and by *Ray v. Compania Naviera Continental, S.A.*, 203 F. Supp. 206 (D. Md. 1962).

The U.S. Ct. Appeals for the 5th Circuit, in *Flanagan, supra,* closely examined and definitely established the criteria that should apply to the injury of a longshoreman on a defective ladder going into the hold of a ship. There the injured longshoreman going down the ladder into No. 2 hold, lost his footing at a point where "one rung of the ladder was missing and the rung below it was bent downward." (A much greater and more obvious defect than a small glob of grease on one rung of the ladder, as in this case).

It appears that no inspection, cursory or otherwise, had been made of the ladder. The Court stated that it was not clear that "merely looking down into the ladder into the hold would have revealed the defect in the ladder." 308 Fed. 2d 122 (Certainly there is testimony in the instant case that no one could see the grease by a look down the ladder to the third or fourth rung from the bottom of the ladder where the grease was located.)

The Court further stated "it was not customary, in Gulf Coast ports, for longshoremen to refrain from beginning work until a representative from the stevedore company checked the holds." 308 F. 2d 122. The testimony showed that shipowners would not countenance delays caused by such inspections. (The testimony in the instant case shows it was not customary in Tampa, a Gulf port, to inspect ladders or holds before unloading (T3 27).

The Court called attention to the fact that indemnity is created, however, when unseaworthy equipment is present and the stevedore by active conduct and negligence brings such defective equipment into play with a resultant injury. (Citing *Crumady,* supra). It further stated that "neither prior cases nor practicality requires a stevedore to make a thorough inspection of a ship for any 'visual defects' before work by his crew commences." 308 Fed. 2d 124.

The Court said that uniformly the stevedore had been held liable for a defect in the ship's ladder, or other similar equipment, only when the stevedore had actual notice of the hazardous situation and failed to take any steps to remedy it. 308 Fed. 2d 124. For same holding see *Ignatyuk,* 250 F 2d 201.

The Court agreed that where the stevedore had actual notice of a dangerous working condistion by reaon of an obvious defect readily observable, liability will be imposed, and cited for such proposition the *Santamarco* and *Smith* decisions, *supra,* in both of which the defect was obvious and actual notice was had by the stevedore.

The Court stated, however, that "where there has been no notice of a damaged or faulty ladder, the courts have not implied a hypothetical duty to inspect, and the stevedore has not been required to indemnify the owner." 308 F. 2d 124. It cited the *Calderola* case, *supra,* where the injury occurred when an employee slipped on grease on a ship's ladder. Even though the employee had put his hand in the grease going up a ladder, it was held that since the grease had been there only a short time before the accident, it would not be reasonable to require the stevedore to have discovered the grease in the course of normal routine. (In the instant case Telfair was split seconds, not minutes, behind Beam on the ladder, even if it be assumed Beam slipped on the grease.)

The Court then stated that a cursory glance down a ladder into a hold would not necessarily have revealed the missing and bent rungs, even if the cases cited by shipowners were given their most favorable interpretation. It said that no more than a cursory look is required. (Certainly, there is evidence in the instant case that a cursory glance would not reveal the small glob of grease on the left side of the rung well down towards the bottom of the ladder.)

The Court stated that there was a good reason for this doctrine in not requiring inspection, because a ship in port must get away as quickly as possible and without expense, delays, etc.

The U.S. Court of Appeals for the 5th Circuit, as late as 1966 reaffirmed the holding of the *Flanagan* decision, *supra*, in *D/S Ove Skou v. Hebert, et al*, 365 F. 2d 341 (1966). It stated on page 349 that *Flanagan* states what the law does not require as a matter of law of a stevedore regarding inspection, and then quotes on the same page, Note 14:

> "Courts allowing indemnity against the stevedore when a longshoreman has been injured through a defect in the ship's ladder or other similar equipment have done so, uniformly, only where the stevedore had actual notice of the hazardous situation and failed to take any steps to remedy it." CIA Maritima Del Nervion v. James J. Flanagan Ship Corp., 5th Cir. 1962, 308 F. 2d 120, 124.
>
> "Nor can we say, as a matter of law, that failure to make a prior inspection is a breach of the standard of performance which a stevedore impliedly warrants to the shipowner." (308 F. 2d at 125.

Continuing, the Court states:

> "The Second Circuit has phrased it:
>
> 'We hold that an implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessels being loaded or unloaded which are not obvious upon a cursory inspection.' Ignatyuk v. Transp.
>
> Chartering Corp., 2 Cir., 1957, 250 F. 2d 198, 201. T. Smith & Son, Inc. v. Skibs A/S Hassel, 5 Cir., 1966, 362 F. 2d 745 (Hybe 23, 1966); Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co., 4 Cir., 1962, 311 F. 2d 663; Orlando v. Prudential S.S. Corporation, 2 Cir., 1963, 313 F. 2d 822; Calderola v. Cunard S.S. Co., 2 Cir., 1960, 279 F. 2d 475; Ray v. Compania Naviera Continental, S.A., D.Md., 1962,

203 F. Supp. 206; Pena v. A/S Dovrefjell, S.D. N.Y., 1959, 176 F. Supp. 677; Parker v. United States, D. Ore., 1963, 223 F. Supp. 647."

It is evident that there was no actual notice to Telfair of grease before his slip and injury on the ladder. As shown hereinbefore, the grease could only be seen after one reached the cargo floor, at least until it was rubbed off by shoes and clothing of the longshoremen descending the ladder. It could not be seen from the tween deck above. The defect, therefore, from a cursory inspection was latent, not patent or "visible."

Under Section 9.25 of the Safety and Health Regulations for longshoremen (1960), now Section 1504.25 (1969), if Telfair had gone down the ladder to inspect it he would have been subjected to the same risk of injury as when he actually went down to begin work and suffered injury. There is no basis to find a "visible" defect, unless one accepts the amazing and incredible testimony of Favors regarding grease on the very top rung, which is contrary to all others testifying and wholly inconsistent as to the location on the ladder where Telfair slipped and was injured.

It should also be pointed out that while the Court in the *D/S Ove Skou* opinion, *supra,* approved the Safety Regulations, it was making a particular application of Section 1504.31 which deals comprehensively with the handling of hatch covers. This section rather rigidly regulates the handling of hatch covers because of their critical relation to safety. We have no argument with the recognition of these Safety Regulations, it being solely our contention that the defect on the ladder

(grease) in the instant case was not visible, and, therefore, the court erred in applying Section 9.25 of such Regulations.

In the *Ray* decision, *supra*, erroneously cited by the district court to sustain its position, a longshoreman was injured by the breaking of a rung of a hatch ladder. Although the rung was cracked which could have been observed if closely viewed under appropriate circumstances, the court held that "there was no type of inspection reasonable and practicable under the circumstances." (203 F. Supp. 211.) The *Ray* decision is in line with the *Flanagan* decision of this Court and the facts of these two cases are quite similar to the instant case involving the injury to Telfair.

The teachings of the Ray case are plain. An absolute standard of care and safety cannot be placed on the stevedore without creating an unduly heavy burden on the shipping industry as a whole. Shipowners want their ships unloaded in a minimum amount of time. Their successful financial operations depend upon such a speedy unloading of cargo. If the holding of the appellate court herein is permitted to stand, stevedores will have to demand detailed and close examinations of all parts of the vessel to which their crews will have access. To be safe, the stevedore would have to detail one or more of the longshoremen to make a thorough inspection of the ship's facilities, including fixed ladders into the hold, before beginning any unloading or loading operations that require use of a ladder as an access instrumentality. This would impose a heavy burden and an unjustified one. Such a holding does not represent the law applicable to the facts of the instant case.

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CONCLUSION

The application of relevant and controlling law to the undisputed facts and credible evidence as reviewed herein, clearly indicates that the district court and appealete court selected rules which do not apply to the facts of this case. The very cases cited for support relate to situations in which the stevedore had within its supervision and control defective or inadequate equipment whose obvious inadequacies it failed to discover, or to situations in which the active conduct and negligence of the stevedore brought into play the faults or defects which produced injury.

It is submitted that the district court and appellate court erred in imposing liability and indemnity on Luckenbach and the judgment against Luckenbach should be reversed and it be discharged without liability, together with reimbursement of costs incurred in defending the third party action.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing petition for a writ of certiorari has been mailed to MacFarlane, Ferguson, Allison and Kelly, 512 North Florida Avenue, Tampa, Florida, and Fowler, White, Collins, Gillen, Humkey and Trenam, P. O. Box 1438, Tampa, Florida, attorneys for Zim Israel Navigation Company; Wagner, Cunningham and Vaughan, 412 Pierce Street, Tampa, Florida, Walter H. Beckham, Jr. and Padhurst and Orsick, 2nd Floor, Concord Building, 66 West Flagler Street, Miami, Florida, Attorneys for Herman Telfair, this 14th day of October _____, 1970.

By James O. Davis, Jr.
JAMES O. DAVIS, JR.